WARIS SELESA SDN BHD v. TRADELIFT INDOPALM INDUSTRIES SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
HARMINDAR SINGH DHALIWAL JCA
HANIPAH FARIKULLAH JCA
[CIVIL APPEALS NO: W-02(NCC)(A)-1657-08-2017 &
W-02(IM)(NCC)-1103-06-2017]
7 JANUARY 2019

CIVIL PROCEDURE: *Jurisdiction – High Court – Company wound up by High Court Sabah and Sarawak ('HCSS') – Party commenced originating summons at High Court of Malaya ('HCM') – Whether HCM had jurisdiction to hear matter – Whether action ought to be instituted at HCSS – Where cause of action accrued – Whether 'place of residence or business' could extend to liquidator of wound up company – Federal Constitution, art. 121 – Courts of Judicature Act 1964, s. 23(1)(a), (b) & (c)*

COMPANY LAW: *Winding-up – Restitution – Companies entered into management and tenancy agreements – Both companies later wound up and liquidators for each company appointed – Tenancy and management agreements terminated – Forfeiture of deposits and rentals – Whether made after presentation of winding-up petition – Whether disposition within s. 223 of Companies Act 1965 – Whether there was application for validation order – Whether remittance of sum after presentation of petition of winding-up valid*

In 2007, the appellant ('defendant') and the respondent ('plaintiff') had executed a management agreement pursuant to which the plaintiff operated, maintained and managed a palm oil mill ('the mill') ('the management agreement'). The defendant was later wound up by the Kota Kinabalu High Court ('KKHC') pursuant to a petition filed by the plaintiff and one Dato' Chong was appointed as the liquidator for the defendant. The plaintiff was also ordered to be wound up by the Muar High Court and joint liquidators were appointed for the plaintiff. Given that the defendant was wound up by the KKHC, the plaintiff obtained leave to bring the action against the defendant, from the High Court of Sabah and Sarawak ('HCSS') at Kota Kinabalu. Following the winding-up of the defendant, Dato' Chong appointed the plaintiff to continue the operation of the mill pursuant to a tenancy agreement ('the tenancy agreement'). However, Dato' Chong terminated the tenancy and management agreements, on the basis that the plaintiff defaulted in rental payments, and forfeited the deposits paid towards

A the outstanding rentals. The plaintiff commenced originating summons ('OS') at the High Court of Malaya at Kuala Lumpur ('HCM'), claiming for RM831,333.33 allegedly appropriated by the defendant, received and retained by Dato' Chong, in violation of s. 223 of the Companies Act 1965 ('the Act'). The defendant applied to strike out the OS, pursuant to O. 18 B r. 19 of the Rules of Court 2012. The High Court Judge ('HCJ') (i) allowed the claim by the plaintiff for restitution of monies under s. 223 of the Act; and (ii) dismissed the defendant's application on the ground that the KLHC, instead of the HCSS, has the jurisdiction to hear the OS. In holding so, the High Court Judge relied on s. 23(1)(a), (b) and (c) of the Courts of Judicature C Act 1964 ('CJA'). Hence, the present appeals. The issues that arose for determination were (i) whether the HCM has the jurisdiction to hear the OS or whether the same ought to be instituted at the HCSS; and (ii) whether the payments of the rentals and forfeiture of deposits, subsequent to the winding-up of the plaintiff, was contrary to s. 223 of the Act.

D **Held (dismissing appeals)**
Per Hanipah Farikullah JCA delivering the judgment of the court:

(1) Based on art. 121 of the Federal Constitution, there are two separate High Courts in Malaysia, exercising distinct territorial jurisdiction over different geographical areas of the country, namely the HCM and the E HCSS. Each has jurisdiction over disputes that arise within its territory. The HCJ specifically acknowledged the importance of the fact that the plaintiff had been wound up and Dato' Chong resided and maintained a place of business in Kuala Lumpur. Where any of the defendants referred to in s. 23(1)(b) of the CJA has been wound up, the words 'place F of residence or business' could also be extended to that of the liquidator of the defendant. (paras 23 & 26)

(2) The reasons given by the HCJ were sound and in harmony with s. 258(2) of the Act which provide that, on the appointment of a liquidator, all the powers of the directors shall cease except so far as the liquidator or G the company in general meeting with the consent of the liquidator approves the continuance thereof. The plaintiff's joint liquidators have not given their consent for the payment of the rentals and the forfeiture of the deposit to the defendant's company. (para 27)

(3) The HCJ had correctly identified that the HCM fulfilled the requirement H of s. 23(1)(a) of the CJA in respect of where the cause of action arose. The plaintiff's cause of action, as embodied in the OS, would clearly reveal that the crux of the action pertained to Dato' Chong's decision in having forfeited the deposits and accepted the rentals after the petition to wind-up the plaintiff had taken place. Under s. 219(2) of the Act, the

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commencement of a winding-up is on the date of the presentation of the petition. The OS was not concerned with the validity of the termination of the agreements. Instead, it sought to determine whether the payments made to the liquidator of the defendant by the plaintiff was lawful in the context of, or in any manner caught by s. 223 of the Act. (paras 28 & 30)

(4) Given that the impugned payments of the sums of monies occurred in the territory of West Malaysia, by reason of (i) the place of business and residence of party making the payments being in Johor and Kuala Lumpur; and (ii) Dato' Chong was in Kuala Lumpur and the fulfillment of the requirements of Form 75 were also performed in Kuala Lumpur, it was clear that the cause of action could not have been more correctly or conveniently commenced in the HCM, specifically Kuala Lumpur. (para 34)

(5) Section 223 of the Act addresses cases where assets legally-owned by a company in winding-up are disposed of. The purpose of s. 223 of the Act is to ensure that at least once the winding-up procedure is started, a company's property is retrieval, in particular for the purpose of being available in order to be distributed. When a winding-up petition has been issued, any disposition of assets made after that date is void. This means that payments made by the company can be recovered by the liquidator. However, s. 223 of the Act allows the court to validate such payments provided certain safeguards are met. The rationale of s. 223 of the Act is to prevent the improper dissipation of the property of the company before the application could be heard. (paras 46 & 52)

(6) At the time of the receipt of the rentals and forfeiture of the deposits, the tenancy agreement had already been terminated and the plaintiff, at the material time, had no other business. Therefore, the said settlement of the rentals and forfeiture of the deposits could not be said to be necessary for the plaintiff's continuation of business which would benefit its general body of creditors. Given that the forfeiture of the rental deposit and the payment of the rentals were made after the presentation of a winding-up petition, it would be a disposition within s. 223 of the Act. There was no application from the defendant for a validation order under s. 223 of the Act. Without an order for validation, the remittance of RM831,333.33 to the defendant, after the presentation of the petition of winding-up, was void. (paras 48, 51 & 56)

A ***Bahasa Malaysia*** *Headnotes*

Pada 2007, perayu ('defendan') dan responden ('plaintif') memeterai satu perjanjian pengurusan yang berdasarkannya plaintif mengendalikan, menyenggara dan menguruskan kilang kelapa sawit ('kilang') ('perjanjian pengurusan'). Defendan seterusnya digulung oleh Mahkamah Tinggi Kota
B Kinabalu ('MTKK') berikutan petisyen yang difailkan oleh plaintif dan seorang bernama Dato' Chong dilantik sebagai pelikuidasi defendan. Plaintif juga diarahkan agar digulung oleh Mahkamah Tinggi Muar dan pelikuidasi bersama dilantik untuk plaintif. Oleh kerana defendan digulung oleh MTKK, plaintif memperoleh kebenaran memulakan tindakan terhadap defendan,
C daripada Mahkamah Tinggi Sabah dan Sarawak ('MTSS') di Kota Kinabalu. Susulan penggulungan defendan, Dato' Chong melantik plaintif untuk mengendalikan kilang tersebut bawah satu perjanjian sewaan ('perjanjian sewaan'). Walau bagaimanapun, Dato' Chong menamatkan perjanjian sewaan dan pengurusan atas alasan plaintif ingkar membayar sewa, dan
D merampas deposit yang dibayar untuk sewaan tertunggak. Plaintif memulakan saman pemula ('SP') di Mahkamah Tinggi Malaya di Kuala Lumpur ('MTM'), menuntut RM831,333.33 yang dikatakan diperuntukkan untuk defendan, diterima dan dipegang oleh Dato' Chong, satu pelanggaran bawah s. 223 Akta Syarikat 1965 ('Akta'). Defendan memohon pembatalan
E SP, bawah A. 18 k. 19 Kaedah-kaedah Mahkamah 2012. Hakim Mahkamah Tinggi ('HMT') (i) membenarkan tuntutan restitusi wang oleh plaintif, bawah s. 223 Akta; dan (ii) menolak permohonan defendan atas alasan MTKL, dan bukan MTSS, berbidang kuasa mendengar SP. Hakim Mahkamah Tinggi memutuskan sedemikian berdasarkan s. 23(1)(a), (b) dan (c) Akta Mahkamah Kehakiman 1964 ('AMK'). Maka timbul rayuan-rayuan ini. Isu-isu yang
F timbul untuk diputuskan oleh mahkamah adalah (i) sama ada MTM berbidang kuasa mendengar SP atau sama ada SP sepatutnya dimulakan di MTSS; dan (ii) sama ada bayaran sewa dan rampasan deposit, berikutan penggulungan plaintif, bercanggah dengan s. 223 Akta.

G **Diputuskan (menolak rayuan-rayuan)**
Oleh Hanipah Farikullah HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan per. 121 Perlembagaan Persekutuan, terdapat dua Mahkamah Tinggi Malaysia berasingan, yang menjalankan bidang kuasa
H wilayah berbeza atas kawasan-kawasan geografi berbeza, dalam negara, khususnya MTM dan MTSS. Kedua-duanya mempunyai bidang kuasa dalam pertikaian-pertikaian yang timbul dalam wilayah masing-masing. Hakim Mahkamah Tinggi, secara khusus, mengakui kepentingan fakta bahawa plaintif telah digulung dan Dato' Chong bermastautin dan

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mempunyai tempat urusan di Kuala Lumpur. Apabila mana-mana defendan yang dirujuk dalam s. 23(1)(b) AMK digulung, perkataan-perkataan 'mempunyai tempat urusan' boleh diluaskan agar terpakai pada pelikuidasi defendan.

(2) Alasan-alasan yang diberi oleh HMT kukuh dan selaras dengan s. 258(2) Akta yang memperuntukkan, selepas pelantikan pelikuidasi, semua kuasa pengarah terhapus kecuali jika pelikuidasi atau syarikat, dalam mesyuarat am, mendapat kebenaran pelikuidasi membenarkan penerusannya. Pelikuidasi bersama plaintif tidak memberi kebenaran bayaran sewaan dan rampasan deposit oleh syarikat defendan.

(3) Hakim Mahkamah Tinggi telah, dengan betul, mengenal pasti bahawa MTM memenuhi syarat s. 23(1)(a) AMK berkenaan tempat kausa tindakan terakru. Kausa tindakan plaintif, seperti yang termaktub dalam SP, jelas mendedahkan inti pati tindakan berkaitan keputusan Dato' Chong merampas deposit dan menerima sewa selepas petisyen penggulungan plaintif berlaku. Bawah s. 219(2) Akta, pemulaan penggulungan ialah pada tarikh pengemukaan petisyen. Saman pemula tidak memfokuskan pada kesahan penamatan perjanjian. Sebaliknya, SP bertujuan menentukan sama ada bayaran-bayaran dibuat oleh plaintif kepada pelikuidasi defendan dalam konteks atau cara yang terikat dengan s. 223 Akta.

(4) Oleh kerana pertikaian bayaran-bayaran jumlah wang berlaku di Wilayah Malaysia Barat, atas alasan (i) tempat bermastautin dan urusan pihak yang membuat bayaran ialah di Johor dan Kuala Lumpur; dan (ii) Dato' Chong berada di Kuala Lumpur dan kepenuhan syarat-syarat Borang 75 juga berlaku di Kuala Lumpur, jelas bahawa kausa tindakan, dengan betul dan sesuai, dimulakan di MTM, khususnya Kuala Lumpur.

(5) Seksyen 223 Akta menumpukan pada kes-kes pelupusan aset-aset yang sah dimiliki oleh syarikat yang digulung. Objektif s. 223 Akta ialah memastikan, sekurang-kurangnya, selepas prosedur penggulungan bermula, harta satu-satu syarikat, jika boleh diperoleh semula, khususnya untuk tujuan ada agar boleh dibahagikan. Apabila petisyen penggulungan dikeluarkan, mana-mana pelupusan aset yang dibuat selepas tarikh tersebut terbatal. Ini bermakna bayaran-bayaran yang dibuat oleh syarikat boleh dikembalikan oleh pelikuidasi. Walau bagaimanapun, s. 223 Akta membenarkan mahkamah mengesahkan bayaran-bayaran sedemikian asalkan beberapa perlindungan dipenuhi. Rasional s. 223 Akta ialah untuk menghalang lesapnya harta syarikat sebelum permohonan boleh didengar.

(6) Semasa penerimaan sewa dan rampasan deposit, perjanjian sewaan telah ditamatkan dan plaintif, pada masa material, tidak mempunyai lain-lain perniagaan. Oleh itu, penyelesaian sewa dan rampasan deposit tidak boleh dikatakan perlu untuk plaintif meneruskan peniagaan yang akan memanfaatkan anggota am pemiutangnya. Oleh kerana rampasan deposit sewa dan bayaran sewa dibuat selepas pengemukaan petisyen penggulungan, ini ialah pelupusan dalam rangkuman s. 223 Akta. Tiada permohonan perintah pengesahan oleh defendan bawah s. 223 Akta. Tanpa perintah pengesahan, pengembalian RM831,333.33 kepada defendan, selepas pengemukaan petisyen penggulungan, terbatal.

Case(s) referred to:

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 HC ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***

Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(refd)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***

NZ New Image Sdn Bhd v. Loh Yok Liang [2016] 9 CLJ 474 CA ***(refd)***

Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 6 CLJ 681 FC ***(refd)***

Syarikat Nip Kui Cheong Timber Contractor v. Safety Life And General Insurance Co Sdn Bhd [1975] 1 LNS 173 HC ***(refd)***

Tan Keen Keong v. Tan Eng Hong Paper & Stationary Sdn Bhd & Ors [2012] 1 LNS 618 CA ***(refd)***

Tan Kah Hoe & Anor v. Budaya Adil Sdn Bhd [1999] 4 CLJ 759 HC ***(refd)***

Tenaga Gagah Sdn Bhd v. Saik Siw Lai & Ors And Another Appeal [2016] 7 CLJ 182 CA ***(refd)***

The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd [2013] 4 CLJ 820 CA ***(refd)***

Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(refd)***

Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd (In Liquidation) [2011] 6 CLJ 47 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 219(2), 223, 258(2)
Courts of Judicature Act 1964, s. 23(1)(a), (b), (c)
Federal Constitution, art. 121
Rules of Court 2012, O. 18 r. 19

Other source(s) referred to:

Walter Woon on Company Law, revised 3rd edn, p 729

For the appellant - Malik Imtiaz Sarwar, Surendra Ananth & Harleen Kaur; M/s Jeeva Partnership

For the respondent - Michael Chow Keat, Simon Hong & Michelle Yoong; M/s Simon Hong

[Editor's note: For the High Court judgment, please see Tradelift Indopalm Industries Sdn Bhd v. Waris Selesa Sdn Bhd [2017] 1 LNS 2074 (affirmed)).]

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah JCA:

Introduction

[1] There are two appeals before us as follows:

(i) Civil Appeal No. W-02(IM)(NCC)-1103-06-2017 ("Appeal 1103") and

(ii) Civil Appeal No. W-02(NCC)(A)-1657-08-2017 ("Appeal 1657")

[2] These appeals arise from the decisions of the learned High Court Judge given in the High Court at Kuala Lumpur dismissing the defendant's application to strike out the plaintiff's originating summon ("OS") under O. 18 r. 19 of the Rules of Court 2012 ("ROC 2012") and allowing the claim by the plaintiff for restitution of monies under s. 223 of the Companies Act 1965 ("CA 1965").

[3] By consent of all parties, we heard both appeals together as it involved similar facts.

[4] For convenience, we will refer to the parties in this judgment as they were referred to in the High Court. At the conclusion of the hearing, we unanimously dismissed it with costs. We now give our reasons for so deciding.

The Background Facts

[5] The background facts have been well set out in both the judgments of the learned High Court Judge. We will only repeat in the following paragraphs the relevant facts as narrated by the learned judge in so far as they are relevant to the issues which arise for decision in these appeals.

[6] The defendant is a company incorporated in Sabah. On 13 June 2014, the defendant was wound-up by the High Court at Kota Kinabalu pursuant to a petition filed by the plaintiff. Dato' Chong Kwong Chin ("Dato' Chong") was appointed as the liquidator for the defendant on the same day.

[7] Pursuant to an order dated 25 February 2016 pronounced by the Muar High Court in Petition No. 28NCC-24-05-2015 presented by Kemajuan Tanah Jujur Sdn Bhd on 25 May 2015, the plaintiff was ordered to be wound up and Ng Pyak Yeow ("Ng") and Venkiteswaran Sankar ("Venki") were appointed as the joint liquidators of the plaintiff.

[8] Given that the defendant had been wound up by the High Court at Kota Kinabalu, the plaintiff obtained leave to bring the action against the defendant on 20 December 2016 from the High Court of Sabah and Sarawak at Kota Kinabalu *vide* Petition No. BKI-28NCC-10-4-2014.

[9] The plaintiff and the defendant had earlier on 14 June 2007 executed a management agreement pursuant to which the plaintiff operated, maintained and managed a palm oil mill known as Kilang Sawit Waris Selesa ("the mill") located at Lahad Datu, Sabah ("the management agreement").

[10] Following the winding-up of the defendant on 13 June 2014, Dato' Chong as liquidator appointed the plaintiff to continue to operate the mill pursuant to a tenancy agreement dated 16 May 2014 ("the tenancy agreement").

[11] However, by a notice dated 26 June 2015, Dato' Chong terminated the tenancy agreement and the management agreement on the basis of the plaintiff's alleged default in ensuring rental payments for the period from November 2014 to June 2015. Dato' Chong also forfeited the deposits paid towards the outstanding rentals.

[12] In the present OS, the plaintiff seeks to make a claim for monies in the sum of RM831,333.33 it alleged to have been appropriated by the defendant in violation of s. 223 of CA 1965. The basis of the allegation was that the said monies were received and retained by the Dato' Chong as the liquidator of the defendant subsequent to the presentation of the petition to wind-up of the plaintiff.

[13] By encl. 6, the defendant had applied to strike out the plaintiff's OS under O. 18 r. 19 of the ROC 2012. The learned High Court Judge had dismissed the defendant's application on the ground that the High Court of Malaya at Kuala Lumpur instead of the High Court of Sabah and Sarawak has the jurisdiction to hear the OS filed by the plaintiff. The learned High Court Judge relied on s. 23(1) (a), (b) and (c) of the Courts of Judicature Act 1964 ("CJA") and the case of *Dayasar Corp Sdn. Bhd. v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11; [1990] 1 MLJ 191 and *Fung Beng Tiat v. Madrid Construction Co* [1997] 2 CLJ 1; [1996] 2 MLJ 413.

Appeal 1103

[14] The issue in this appeal is whether the High Court of Malaya has jurisdiction to hear the OS or whether the same ought to be instituted in the High Court of Sabah and Sarawak.

[15] By encl. 6, the defendant had applied to strike out the plaintiff's OS under O. 18 r. 19 of the Rules of Court 2012 (RC). The learned High Court Judge had dismissed the defendant's application on the ground that the High Court of Malaya at Kuala Lumpur instead of the High Court of Sabah and Sarawak has the jurisdiction to hear the OS filed by the plaintiff. The learned High Court Judge relied on s. 23(1)(a), (b) and (c) of the CJA and the case of *Dayasar Corp Sdn. Bhd. v. CPNY & Co Sdn Bhd (supra)* and *Fung Beng Tiat v. Madrid Construction Co (supra)*.

[16] The learned High Court Judge began his analysis by referring to s. 23(1) of the CJA. In his view, various limbs of s. 23(1) of CJA, four in total, are to be read disjunctively, given the grammatical conjunction "or". The learned High Court Judge stated that he agreed with the defendant's argument that limb (b) of s. 23(1) of CJA applied on consideration of locality of the place of business or residence was not erroneous. However, the learned judge found that the defendant's argument failed to consider the fact that the defendant has been wound up and the appointed liquidator of the defendant, Dato' Chong resides and maintains his place of business not in Sabah, but in Kuala Lumpur.

[17] The learned judge correctly explained that the purpose of s. 23(1)(b) of CJA is to ensure that the relevant parties envisaged to be involved in any legal proceedings are not to be required to attend the same beyond the territorial jurisdiction of the place where the parties are residing or conduct business.

[18] The learned High Court Judge states at the conclusion of his judgment in the following:

> The impugned payments of the sums of monies occurred in the territory of West Malaysia by reason of first, the place of business and residence of party making the payments being in Johor and Kuala Lumpur (of the Plaintiff and its joint liquidators, respectively) and secondly, that of the party receiving the monies, DC, as the liquidator of the Defendant is in Kuala Lumpur, and coupled with the key fact that the subsequent fulfilment of the requirements of Forms 75 were also performed in Kuala Lumpur, in the High Court of Malaya, specifically, in Kuala Lumpur.

[19] Before us, the main thrust of the contention of the defendant's learned counsel was that the High Court fell into error in failing to consider that the High Court of Malaya is not the right forum or the forum of convenience to commence this action or that the High Court of Malaya does not have the necessary jurisdiction to hear this action.

[20] It was submitted for the defendant that since the defendant company has its registered office in Kota Kinabalu Sabah, the present OS fall, within the scope of s. 23(1)(b) of CJA. Therefore, the defendant argued, the High Court of Sabah and Sarawak has the jurisdiction to hear the OS.

[21] On the contrary, learned counsel for the plaintiff took the position that the OS is not concerned with the question on the validity of termination of the agreements, but instead, it seeks to determine whether payments made to the liquidator was lawful in the context of s. 223 of the CA 1965. In refuting the defendant's position, it was submitted for the plaintiff that the learned High Court Judge was correct when he held that by reason of the payments and receipts having taken place in Kuala Lumpur, the High Court of Malaya at Kuala Lumpur could also be justified as the correct forum under s. 23(1)(c) of CJA. Following this section, the basis of jurisdiction being "the facts on which the proceedings are based exist at Kuala Lumpur."

[22] We have read the appeal records and the judgment of the High Court Judge. We have also considered the written and oral submissions of both the parties.

[23] For proper determination of this issue, it is clear from art. 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

[24] Referring to the case of *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life And General Insurance Co Sdn Bhd* [1975] 1 LNS 173; [1975] 2 MLJ 115, this court in the case of *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1; [1996] 2 MLJ 413 held as follows:

> It is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121 (1) of the Constitution speaks of the two High courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of each two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provision of O 11 Rule 1 of the Rules of the Supreme Court 1957 for convenience for otherwise

unnecessary difficulties will arise in the process of the courts within Malaysia. The enactment of s 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognises the distinctive territorial jurisdiction of the two High Courts in Malaysia.

[25] In order to understand the basis of the learned High Court Judge reasoning, it is convenient at this stage to refer to s. 23 of CJA which provides as follows:

Section 23. Civil jurisdiction – general

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[26] In his judgment, the learned High Court Judge specifically acknowledged the importance of the fact that the plaintiff had been wound up and its appointed liquidator, namely the Dato' Chong, resides and maintains a place of business in Kuala Lumpur. We are in agreement with the learned High Court Judge in his analysis of s. 23(1)(b) of CJA to the facts of the present case. The learned High Court Judge said:

(i) In a liquidation context, the most important party for the wound-up entity is without any doubt, its liquidator. As such, the address of the liquidator cannot be excluded from the remit of limb (b) of s. 23(1)(b) of the CJA. It should also be noted that whilst most of the cases dealing with this issue of jurisdiction concerned the filling of actions in personal and corporate insolvency matters, not unlike the instant OS, they are however mainly related the process prevailing at the stage prior to the winding up of the company or the bankruptcy of the individual.

(ii) This thus provides further support to the view that upon the grant of a winding-up order, the involvement of the liquidator who would now manage the affairs and business of the wound-up company must be given appropriate recognition. The place of business of the liquidator too is relevant, applicable and must be taken into account for purposes of s. 23(1) of CJA. This cannot be shown more clearly than the situation in the instant OS where the focus of the allegation giving rise to the OS is the very act of the liquidator Dato' Chong in having received the said sums of monies.

(iii) In my view, therefore, where any of the defendants referred to in s. 23(1)(b) of CJA has been wound up, the words "place of residence or business" therein could also be extended to that of the liquidator of the said defendant.

[27] In our view, the reasons given by the learned judge are sound and in harmony with s. 258(2) of the CA 1965 which provide that on the appointment of a liquidator, all the powers of the directors shall cease except so far as the liquidator or the company in general meeting with the consent of the liquidator approves the continuance thereof. In this instant case, it is not disputed by the defendant, that the plaintiff's joint liquidators have not given their consent for the payment of the rentals and the forfeiture of the deposit to the defendant's company.

[28] Further, we find that the learned High Court Judge had correctly identified that the other reason why the High Court of Malaya is the correct jurisdiction because the same fulfills the requirement of limb (a) of s. 23(1) of CJA in respect of the question where the cause of action arose.

[29] An important point to consider in this instant case is that the plaintiff's cause of action as embodied in the OS would clearly reveal that the crux of the action pertains to Dato' Chong's decision in having forfeited the deposits on 26 June 2015 and accepted the rentals between 6 June 2015 and 1 October 2015, namely after the petition to wind up the plaintiff had taken place. It is settled law that under s. 219(2) of the CA 1965, the commencement of a winding-up is on the date of the presentation of the petition. (See: *Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd* [2008] 6 CLJ 681 (FC); *Tenaga Gagah Sdn Bhd v. Saik Siw Lai & Ors And Another Appeal* [2016] 7 CLJ 182 (CA); *Tan Keen Keong v. Tan Eng Hong Paper & Stationary Sdn Bhd & Ors* [2012] 1 LNS 618; [2012] 3 MLRA 594 (CA) and *Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd (In Liquidation)* [2011] 6 CLJ 47 (CA)).

[30] It is clear that the present OS is not concerned with the validity of the termination of the agreements, but instead it seeks to determine whether the payments made to the liquidator of the defendant by the plaintiff was lawful in the context of, or in any manner caught by the provisions of s. 223 of CA.

[31] We find no merit in the defendant's argument that the cause of action arose in Sabah as the disputed sums of monies on the payments of rentals and utilities stemmed out of the management agreement of the mill which is indisputably located in Lahad Datu in the state of Sabah. And for those reasons falling within the territorial jurisdiction of the High Court of Sabah and Sarawak.

[32] In our view, the disputed sums of monies which established the cause of action in the OS, arose in Kuala Lumpur for payment of these monies were made by the plaintiff, an entity which at all material times had its registered address in Muar, Johor and where the plaintiff's joint liquidators' offices are also located in Kuala Lumpur.

[33] Furthermore, the evidence of the receipts of payments of the said sums in the relevant Form 75 was sworn and lodged by Dato' Chong, as the liquidator of the defendant with the Companies Commission of Malaysia at Kuala Lumpur and the relevant correspondences between the parties also took place in Kuala Lumpur.

[34] As such, we agreed with the plaintiff's submission that given that the impugned payments of the sums of monies occurred in the territory of West Malaysia by reason of first, the place of business and residence of party making the payments being in Johor and Kuala Lumpur (of the respondent and its joint liquidators, respectively) and secondly, that of the party receiving the monies, Dato' Chong as the liquidator of the defendant is in Kuala Lumpur, and coupled with the key fact that the subsequent fulfilment of the requirements of Form 75 were also performed in Kuala Lumpur, it is clear that the cause of action could not have been more correctly or conveniently commenced in the High Court of Malaya, specifically in Kuala Lumpur.

[35] Premised on the above, we see no merit in the defendant's appeal on this issue. We dismissed this appeal with costs of RM5,000 subject to the payment of allocatur's fee.

Appeal 1657

[36] The issue in this appeal is whether the payments of the rentals and the forfeiture of deposits subsequent to the winding-up of the plaintiff is contrary to s. 223 of CA 1965.

[37] Enclosure 1 is an application by the plaintiff for declarations to essentially declare the forfeiture of the deposits and payment of rentals as "void dispositions" under s. 223 of CA and for a consequential order that the appellant return the said payments to the plaintiff.

[38] In respect of the OS, the learned High Court Judge found that the plaintiff has established its case for the reliefs sought in its OS, given the findings that the payments in question constituted dispositions made by the plaintiff after the commencement of its winding-up contrary to s. 223 of CA.

[39] The relevant passages of the learned High Court Judge judgment which is worthwhile quoting *in extenso*:

> [34] *The payment of Rentals totaling RM681,333.33 was received from the plaintiff between 16 June 2015 and 1 October 2015, after the purported termination of the deposits were retained and forfeited by DC after the presentation of the petition against the plaintiff on 25 May 2015 and subsequent to the appointment of the plaintiff's provisional liquidators on 24 June 2015.* Therefore, at the time of payment by the plaintiff to the defendant, by way of retention of Rental and forfeiture of deposits by the defendant, a petition for winding-up had already been presented against the plaintiff.
>
> [35] The plaintiff was wound-up on 25 February 2016, the date of the presentation of the petition became the commencement date of winding-up of the plaintiff pursuant to s. 219(2) of the CA. Any payments subsequent to the commencement date, like the retention of Rentals and forfeiture of deposits are therefore void under s. 223 of the CA.
>
> [49] *In the instant case, the Plaintiff was effectively insolvent and monies were disposed without the knowledge of the Plaintiff's liquidators. No evidence had been adduced to show the existence of any benefit accruing to the Plaintiff and its general creditors from the business relationship it had with the Defendant, or specifically by virtue of the disposition, which appears in all likelihood utilised to have settled any debt due to the Defendant instead of to the other creditors, or even to the petitioner who in the first place, obtained the winding-up order against the Plaintiff.*
>
> [50] I accept the Respondent's submission at the time of the receipt of the Rentals and the forfeiture of the Deposits, the Tenancy Agreement had already been terminated and the Plaintiff at the material time had no other business. Thus, by no stretch of imagination can it be asserted that the disposition in question was necessary for the Plaintiff's continuation of business in order to benefit its general body of creditors. Furthermore, no benefits had been able received, let alone available for distribution towards satisfying the proofs of debt filed by the creditors of the Plaintiff.
>
> …

> [76] Thus, the Defendant cannot conveniently argue that the transaction is just like any other ordinary landlord and tenant relationship, where the Plaintiff as a tenant had an obligation to pay rents pursuant to the agreements executed, in the ordinary course of business. For these would also be the kinds of payments that every unsecured creditor of the Plaintiff could seek to challenge. The test propounded by the Federal Court in *Wong Wee Kheong* must still be applied. (emphasis added)

[40] The defendant did not dispute that the disposition of a company's property is generally prohibited under s. 223 of CA 1965 after the filing of a winding-up petition. However, the defendant stressed that the learned High Court Judge fell into error in failing to consider the deposits payment were made before the filing of the winding-up petition, ie, in August 2014 and the winding-up petition was filed only on 25 May 2015. Therefore, it was submitted for the defendant that the learned High Court Judge had erred when he essentially relied on Form 75 in coming to the conclusion that the forfeiture of the deposit was made after the filing of the winding-up petition and was therefore void.

[41] In this regard, learned counsel for the defendant submitted that the defendant forfeited the deposits payments to "partly settle the outstanding rental due and owing". The said rentals were outstanding from November 2014. As such, it was argued for the defendant that the obligations to pay the rental sums crystallised before the filing of the winding-up petition.

[42] It was also contended for the defendant that the learned High Court Judge erred in failing to appreciate that the plaintiff was not entitled to claim the sum of RM831,333.33 from the defendant under s. 223 of the CA 1965 as the payment of the said monies were made towards the rental pursuant to a valid tenancy agreement and is not unlawful. Further, the obligation to pay that money was still existing at the time of presentation of the petition.

[43] In refuting the contention of the defendant, learned counsel for the plaintiff took the position that the forfeiture of the deposits and the payment of rentals to the defendant is contrary to s. 223 of the CA 1965 and unlawful as the rentals and the deposit were retained and forfeited after the presentation of petition and the appointment of Ng and Venki as the plaintiff's provisional liquidators *vide* order dated 24 June 2015.

[44] We have given our utmost consideration to the submissions of both parties but we found ourselves unable to agree with the submissions of the defendant.

[45] This appeal calls for consideration of s. 223 of the CA 1965 which provides:

> **Avoidance of disposition of property, etc**
>
> 223. Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[46] It seems to us the starting point must be an understanding of what is the purpose of s. 223 of the CA 1965. When a winding-up petition has been issued, any disposition of assets made after that date is void. This can mean that payments made by the company can be recovered by the liquidator. However, s. 223 of the CA allows the court to validate such payments provided certain safeguards are met. The rationale of s. 223 of the CA is to prevent the improper dissipation of the property of the company before the application can be heard. (See *Walter Woon on Company Law*, revised 3rd edn, at p. 729)

[47] Coming back to the present case, as we have stated earlier, the evidence shows that the tenancy agreement was terminated by the notice dated 26 June 2015 issued by the defendant. Further, the payments of rentals totaling to RM681,333.33 were received from the plaintiff between 16 June 2015 and 1 October 2015, after the filing of the winding-up petition of the plaintiff.

[48] It is not disputed by the defendant that at the time of receipt of the rentals and forfeiture of the deposits, the tenancy agreement had already been terminated and the plaintiff at all material time had no other business. Therefore, in our view, the said settlement of the rentals and forfeiture of the deposits cannot be said to be necessary for the plaintiff's continuation of business which would benefit its general body of creditors.

[49] In fact, according to Form 75 lodged on 18 February 2015 ("Account-1"), Dato' Chong acknowledged receiving a total of RM150,000 on 14 August 2014 from the plaintiff, which consisted of 'rental deposit' amounting to RM100,000 and 'utility deposit' amounting to RM50,000.

[50] Further, according to another Form 75 lodged on 13 January 2016 ("Account-3"), the defendant's liquidator acknowledged receiving monies amounting to a total sum of RM831,333.33 from the respondent between 16 June 2015 and 1 October 2015 as 'rental of mill'.

[51] We are of the considered view that given that the forfeiture of the rental deposit and the payment of the rentals were made after presentation of a winding-up petition, it would be a "disposition" within s. 223 of the CA.

[52] It is worth repeating that s. 223 of the CA addresses cases where assets legally owned by a company in winding up are disposed of. The purpose of s. 223 of the CA is to ensure that at least once the winding-up procedure is started, a company's property is retrieval, in particular for the purpose of being available in order to be distributed.

[53] Under s. 223 of the CA, the disposition of the property of the company after the presentation of a winding up is void unless validated by the court (see: *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 and *Tan Koh Hoe & Anor v. Budaya Adil Sdn Bhd* [1999] 4 CLJ 759).

[54] Learned counsel for defendant contended that s. 223 of CA did not impose any timeline when validation must be obtained and that any court could grant validation at any time citing the Court of Appeal case of *The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd* [2013] 4 CLJ 820, and the Federal Court case of *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969.

[55] Recently, this court had an occasion to consider a similar argument in the case of *NZ New Image Sdn Bhd v. Loh Yok Liang* [2016] 9 CLJ 474 where no validation application was made by the appellant. Delivering the judgment of the court, Idrus Harun JCA (now FCJ) held:

> In *Ayer Molek* the *ratio* relates to the winding up court granting a stay of winding up order pursuant to s. 243 of the Act. The appellant, it is to be observed, cited *The Ayer Molek* as the authority that any court could grant validation or leave under s. 223 of the Act at any time. This argument is plainly wrong because an application for validation or leave must appropriately be heard by the winding up court so that the winding up judge will have control of all such applications made before him.

[56] It ought to be noted that in this instant case, there was no application from the defendant for a validation order under s. 223 of the CA. In our view, without an order for validation, the learned High Court Judge was right when he said, that remittance of RM831,333.33 to the defendant after the presentation of the petition of winding up, was void. This reasoning is consistent with the view expressed by the Supreme Court in *Lian Keow Sdn Bhd (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449.

[57] For that reason, in our indulgence, this appeal is dismissed with cost of RM10,000 subject to the payment of allocatur. We affirmed the decision of the High Court and we agree with the learned judge who had ordered for the entire remittance must be returned to the plaintiff.

Conclusion

[58] Having regard to the matter set out above, we are unable to accept the appellant's arguments. The learned High Court Judge did not err on the facts or in law. We therefore unanimously dismissed Appeal No. W-02(IM)(NCC)-1103-06-2017 and Appeal No. W-02(NCC)(A)-1657-08-2017 with costs of RM5,000 and RM10,000 respectively subject to the payment of allocatur. The deposit is to be refunded to the defendant. We, therefore, affirmed the decision of the High Court Judge.